No. 80-1132

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

ROBERTA JEAN GALLI RUSSELL, - - **Petitioner,**

versus

WILLIAM LEE RUSSELL, - - - - **Respondent.**

Petition For a Writ of Certiorari to the Court of Appeals of the Commonwealth of Kentucky

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RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether under Article VI, Clause 2 of the United States Constitution Federal Military Retirement Statutes prohibit the division of military retired pay as property in a divorce action.

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v.

WILLIAM LEE RUSSELL, - - - *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, William Lee Russell, respectfully requests that this Court deny the Petition for a Writ of Certiorari seeking review of the opinion of the Kentucky Court of Appeals in this case. That opinion is reported at 605 S. W. 2d 33 (1980). (Petitioner, App. A).

CONSTITUTIONAL PROVISIONS AND STATUTES

See Appendix A.

STATEMENT OF THE CASE

Respondent agrees with the statement of the case as set forth in the Petitioner's brief (Pet. 5-8) in all respects except for the final paragraph editorializing about "experience as an 'army wife'." (Pet. 8)

The trial Court awarded over fifty percent of the marital property to Petitioner and determined that she was not entitled to maintenance only after taking into consideration her Civil Service Retirement and her monthly salary of $1,600 per month. (Pet. Appendix C).

REASONS WHY THE WRIT SHOULD BE DENIED

1. This Court Has Declined Review of This Same Question.

Since this Court's decision in *Hisquierdo* v. *Hisquierdo,* 439 U. S. 572 (1979), this Court has twice been asked to review the same issue regarding military retirement and has twice denied such review. *Starren* v. *Starren* (California, 1979) (No. 78-1691) *Cert. Den.* 47 L. W. 3222, 62 L. Ed. 2d 110; *Chisnell* v. *Chisnell* (Michigan, 1978), 267 N. W. 2d 155, *Cert. Den.* 442 U. S. 940, 61 L. Ed. 2d 310, *Reh. Den.*, October 1, 1979.

2. The Question Raised in the Petition Is Controlled by Past Decisions of This Court.

This question is controlled by past decisions of this Court in *Hisquierdo* v. *Hisquierdo,* 439 U. S. 572 (1979); *Wissner* v. *Wissner,* 338 U. S. 655 (1950); and *Free* v. *Bland,* 39 U. S. 663 (1962).

As determined by the Kentucky Court in this case and the Alaska Supreme Court in *Cose* v. *Cose,* 592 P. 2d 1230 (Alas. 1979), *Cert. petition docketed,* 48 U.S.L.W. 3627 (U.S. March 19, 1980) (No. 79-1469), the federal statutory scheme for military retired pay and for railroad retired pay are so similar as to

make the conclusion inescapable that *Hisquierdo, supra,* requires that military retired pay not be divided as property by a State Court. In *Hisquierdo,* this Court held that retirement benefits under the Federal Railroad Retirement Act (45 U.S.C. § 231, *et seq.*), could not be divided as marital property by a State Court. This Court cited the fact that Railroad Retirement benefits are not attachable except for child support and alimony payments (42 U.S.C. §659) and the fact that spousal benefits under the Railroad Retirement Act are lost upon divorce. 45 U.S.C. §231d(c)(3).

Prior to the enactment of 42 U.S.C. 659 in 1975, military retired pay had never been available for attachment under the doctrine of sovereign immunity. *Buchanan* v. *Alexander,* 45 U. S. 20 (1846); *Applegate* v. *Applegate,* 39 F. Supp. 887 (D.C. 1941); *Arnold* v. *United States,* 331 F. Supp. 42 (D.C. 1971). 42 U.S.C. §659 now allows attachment of military active duty and retired pay for purposes of securing child support or alimony payments. However, Congress' definition of alimony (42 U.S.C. §662(c)) does not include division of marital or community property. Furthermore, under the Armed Forces Retired Serviceman's Family Protection Plan (10 U.S.C. §1431, *et seq.*), a survivor's annuity is lost upon divorce. (10 U.S.C. §1434(c)).

This Court's decisions in *Wissner* v. *Wissner, supra,* and *Free* v. *Bland, supra,* were also considered to be dispositive by the Kentucky Court. *Wissner* involved National Service Life Insurance and *Free* involved a United States Savings Bond. In both cases,

this Court held the preemption doctrine prevented the serviceman's life insurance and the United States Savings Bonds from being considered as community property by a State Court.

3. Domestic Relations Law Has Always Been Peculiar to Each State and There Is No Need for This Court to Standardize One Particular Segment of That Law.

Respondent acknowledges that the decision below conflicts with the decision of the California Court in *McCarty* v. *McCarty,* —— Cal. 3d —— (1980) (Supreme Court No. 80-5). However, as the Court is aware, there have always been vast differences between the divorce laws of the various states, some states having community property laws and other states deriving their divorce laws from the common law. There is no greater incentive to forum shop regarding military pensions and retirement benefits after divorce than the incentive already presented by the comparative ease or difficulty of obtaining a divorce in various states.

4. The Issue Raised in the Petition Is of Minor Importance.

The impact of the decision below is minimal in view of the holding that military retirement pay can be considered as an asset when determining an appropriate amount for maintenance and support. The Kentucky Court said,

> Our conclusion to exclude military retirement pay from divisible marital property in no way precludes a trial Court from considering such an asset when determining an appropriate amount for

> maintenance and support. KRS 403.200. If maintenance is appropriate, the income will be available to satisfy a reasonable award, especially if there are few other assets or resources to be divided. In many cases, a military pension may be the only significant asset in a family, and a spouse must not be left destitute and without some support, simply because the pension is not divisible property. 605 S. W. 2d 33, 36 (1980).

Thus, contrary to Petitioner's assertions, a divorced military spouse is entitled to have the military pension considered by the Court in determining the alimony questions.

CONCLUSION

For the foregoing reasons, the Writ should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

Article VI, Clause 2 of the United States Constitution reads:

> "This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any state to the contrary notwithstanding."

10 USC §1434(c) reads in the relevant part:

> ". . . An election of any annuity under clause (3) of subsection (a) shall provide that no deduction may be made from the elector's retired or retainer pay after the last day of the month in which there is no eligible spouse because of death or divorce."

42 USC §659 reads in the relevant part:

> "(a) Notwithstanding any other provision of law, effective January 1, 1975, moneys (the entitlement to which is based upon remuneration for employment) due from, or payable by, the United States or the District of Columbia (including any agency, subdivision, or instrumentality thereof) to any individual, including members of the armed services, shall be subject, in like manner and to the same extent as if the United States or the District of Columbia were a private person, to legal process brought for the enforcement, against such individual of his legal obligations to provide child support or make alimony payments."

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42 USC §662 reads in the relevant part:

"(c) The term 'alimony', when used in reference to the legal obligations of an individual to provide the same, means periodic payments of funds for the support and maintenance of the spouse (or former spouse) of such individual, and (subject to and in accordance with State law) includes but is not limited to, separate maintenance, alimony pendente lite, maintenance, and spousal support; such term also includes attorney's fees, interest, and court costs when and to the extent that the same are expressly made recoverable as such pursuant to a decree, order, or judgment issued in accordance with applicable State law by a court of competent jurisdiction. Such term does not include any payment or transfer or property or its value by an individual to his spouse or former spouse in compliance with any community property settlement, equitable distribution of property, or other division of property between spouses or former spouses."